LOVE AND THE LAW: FEDERAL CASES CHALLENGING STATE BANS ON SAME-SEX MARRIAGE

In a historic ruling on June 26, 2015, the Supreme Court, in *Obergefell v. Hodges*, agreed with 34 other federal judges who had found that the right to marriage for same-sex couples was protected by the Fourteenth Amendment. The effect of the ruling will be sweeping. In a few short months, marriage equality will be the law nationwide.

The ruling is the culmination of decades of work by LGBT advocates to improve public opinion while collecting victories in lower courts around the country. In June 2013 the United States Supreme Court decided two high profile marriage equality cases, *United States v. Windsor*1 and *Hollingsworth v. Perry*.2 Neither squarely addressed the question of whether same-sex couples have a constitutional right to marry, both led to further litigation in federal courts across the. Prior to the rulings, fewer than a dozen federal cases had addressed restrictions on same-sex marriages—and all of them were unsuccessful.3 After the rulings, judges from across the ideological spectrum changed course. Thirty-four of them, including 11 appointed by Republican presidents, agreed—based on the Supreme Court's *Windsor* decision—the Constitution requires the right to marry be extended to same-sex couples.4 Now, five Supreme Court justices have agreed with them.

Although it is an important step forward, the broader fight for equality is just beginning. LGBT Americans are still disproportionately poor5 and are more likely to be subject to the criminal justice system.6 They are more likely to be bullied,7 abuse drugs and alcohol,8 and end up homeless.9 And, in

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most states, with this ruling in place, a couple could get married in the morning and fired from their jobs later that afternoon because of their sexual identity, with no hope of redress.

Still, the decision marks a milestone for equality. Below, each federal lawsuit ruling on the legality of a same-sex marriage ban—beginning with Perry itself—is summarized by circuit, and each presiding judge is briefly profiled.

**FIRST CIRCUIT**

Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island

**Puerto Rico**

On October 21, 2014, District of Puerto Rico Judge Juan Pérez-Giménez became only the third federal district judge to uphold a marriage equality ban since the *Windsor* ruling. Judge Pérez-Giménez held that *Baker v. Nelson*, a 1972 Supreme Court case that was dismissed “for want of a substantial federal question,” was still binding precedent on the court.  

This reasoning has been rejected by other federal judges, including 11 circuit court judges, most of whom concluded that *Windsor* overruled or undermined the 42-year-old case. Not so, Judge Pérez-Giménez argued. Rather, he wrote, *Windsor* “reaffirm[ed] the States’ authority over marriage.” Judge Pérez-Giménez went on to question whether pro-marriage equality rulings would create a slippery slope. “And yet what is lacking and unaccounted for remains: are laws barring polygamy, or, say the marriage of fathers and daughters, now of doubtful validity?”

The plaintiffs appealed the decision to the U.S. Court of Appeals for the First Circuit. On March 20, 2015, Puerto Rican officials announced they would no longer defend the marriage ban; however, on April 14, a group of territory senators and representatives filed a motion to intervene to defend the ban. The Puerto Rican government and the plaintiffs have opposed the intervention, but no ruling has been made.

On April 14, the First Circuit Court of Appeals issued an order delaying oral arguments in the case until after the upcoming Supreme Court ruling in *Obergefell*. In light of the Supreme Court’s decision striking down bans on marriage equality, the First Circuit will likely follow suit in this case.

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11 Id. at *19.

12 Id. at *24.


14 Motion to Intervene at 5-9, Conde-Vidal v. Ruis-Armendariz, No. 14-2184 (1st Cir. April 14, 2015).


Judge Pérez-Giménez was appointed to the federal bench by President Jimmy Carter in 1979. Prior to joining the federal bench, he served as an assistant United States attorney and a federal magistrate judge.

Where Same-Sex Marriage Stands in the Circuit

**Massachusetts**: Legalized by the state supreme court on November 18, 2003.

**New Hampshire**: Legalized by the state legislature on June 3, 2009.

**Maine**: Legalized by voter initiative on November 6, 2012.

**Rhode Island**: Legalized by the state legislature on May 2, 2013.

**Puerto Rico**: Will soon be legal. Ban upheld by federal district court, but likely to be overturned.

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**SECOND CIRCUIT**

Connecticut, New York, Vermont

**Massachusetts**: Legalized by the state supreme court on November 18, 2003.

**New Hampshire**: Legalized by the state legislature on June 3, 2009.

**Maine**: Legalized by voter initiative on November 6, 2012.

**Rhode Island**: Legalized by the state legislature on May 2, 2013.

**Puerto Rico**: Will soon be legal. Ban upheld by federal district court, but likely to be overturned.

**Vermont**: Legalized by the state legislature on April 7, 2009.

**New York**: Legalized by the state legislature on June 24, 2011.

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**THIRD CIRCUIT**

Delaware, New Jersey, Pennsylvania

**Pennsylvania**

On May 20, 2014, Middle District of Pennsylvania Judge John Jones III ruled that Pennsylvania’s statutory ban on gay marriage violated the Equal Protection and Due Process clauses of the Fourteenth Amendment.\(^\text{17}\) In his decision, Judge Jones compared marriage equality to the struggle for civil rights:

> In the sixty years [since] *Brown [v. Board of Education]* was decided, ‘separate’ has thankfully faded into history, and only ‘equal’ remains. Similarly, in future generations the label *same-sex marriage* will be abandoned, to be replaced simply by *marriage*. We are a better people than what these laws represent, and it is time to discard them into the ash heap of history.\(^\text{18}\)

Following the ruling, Pennsylvania’s Republican Governor Tom Corbett announced that he would not appeal based on the poor likelihood of success.\(^\text{19}\)

Judge Jones was appointed to the federal bench by President George W. Bush in 2002 after having been recommended by then-Senator Rick Santorum (R-PA).\(^\text{20}\) Judge Jones is best known for his decision in *Kitzmiller v. Dover Area School District*, in which he ruled that the teaching of intelligent design in public

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\(^{18}\) Id. at 431.


schools was unconstitutional. That ruling caused him to be named as one of TIME Magazine’s 100 Most Influential People in 2006.

**Where Same-Sex Marriage Stands in the Circuit**

- **Delaware:** Legalized by the state legislature on May 7, 2013.
- **New Jersey:** Legalized by a state superior court on September 27, 2013.
- **Pennsylvania:** Legalized by a federal district court on May 20, 2014.

**Virginia**

On February 13, 2014, Eastern District of Virginia Judge Arenda Wright Allen struck down the Virginia constitution’s provision banning same-sex marriage, which had been ratified by the voters in 2006. Judge Wright Allen held that marriage was a fundamental right, and, as such, the state’s decision to limit access to marriage should be judged at the highest level or “strict scrutiny.” While Virginia failed to meet that heightened standard, Judge Wright Allen also found that Virginia’s marriage ban would fail to meet even the lowest level of scrutiny. The laws “fail to display a rational relationship to a legitimate purpose,” and therefore violated the Equal Protection and Due Process clauses of the Fourteenth Amendment. Judge Wright Allen also cited Justice Scalia’s dissent in *Windsor*, in which Scalia stated: “How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.” Judge Wright Allen stayed her decision pending appeal to the Fourth Circuit.

Judge Wright Allen was appointed to the federal bench by President Obama in May 2011. Prior to her appointment she had served both as an assistant United States attorney and an assistant federal public defender.

**Fourth Circuit Ruling**

On July 28, 2014, a three-judge panel of the Fourth Circuit affirmed Judge Wright Allen’s ruling by a vote of 2-1. The panel included Judge Paul V. Niemeyer (appointed by President George H.W. Bush in 1990), Judge Roger L. Gregory (originally appointed by President Clinton in 2000 as a recess appointment, then later nominated by President George W. Bush), and Judge Henry Franklin Floyd (appointed by President Obama in 2011). Joined by Judge Gregory, Judge Floyd’s majority opinion held that because restrictions on same-sex marriage infringe upon the fundamental right to marry, they are held to “strict scrutiny.” Under that framework, Virginia’s ban violates the Equal Protection and Due Process clauses.

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25 Id. at 473.
26 Id. at 482.
27 Id.
28 Id. at 476 (citing *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting)).
of the Fourteenth Amendment. Additionally, the opinion compared same-sex marriage to other marriage cases—most notably the landmark interracial marriage case Loving v. Virginia. Over the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms. These cases do not define the rights in question as “the right to interracial marriage,” “the right of people owing child support to marry,” and “the right of prison inmates to marry.” Instead, they speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right. The Supreme Court’s unwillingness to constrain the right to marry to certain subspecies of marriage meshes with its conclusion that the right to marry is a matter of freedom of choice that resides with the individual.

Judge Niemeyer dissented, arguing that the traditional understanding of marriage is “distinct from the newly proposed relationship of a ‘same-sex marriage.’” Same-sex marriage, therefore, would not qualify as a fundamental human right.

Virginia Attorney General Mark Herring, who did not defend the law in court, nevertheless requested a stay of the Fourth Circuit’s ruling until the case reached the Supreme Court. As a result of the ruling, North Carolina’s Attorney General Roy Cooper announced that he would no longer defend that state’s ban since it was not likely to prevail in court.

On August 22, 2014, the Clerk of the Circuit Court of the City of Norfolk, Virginia filed a writ of certiorari with the Supreme Court. The Court denied certiorari on October 6, 2014, and the Fourth Circuit’s stay was lifted.

**North Carolina**

On October 10, 2014, Western District of North Carolina Judge Max O. Cogburn, Jr. struck down North Carolina’s ban on same-sex marriages. In a short ruling, Judge Cogburn held that the Fourth Circuit’s opinion in Bostic v. Schaefer was binding in North Carolina. In 2011, President Barack Obama appointed Judge Cogburn to his seat on the Western District of North Carolina. He previously was a federal magistrate judge, an assistant United States attorney, and an attorney in private practice.

On October 14, 2014, Middle District of North Carolina Judge William L. Osteen, Jr. struck down the state’s marriage ban for similar reasons. Judge Osteen was appointed to the federal bench by President George W. Bush in 2007. Prior to serving, he worked in private practice.

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31 Id. at 67 (Niemeyer, J., dissenting).
**South Carolina**

On November 12, 2014, District Judge Richard Mark Gergel joined the rest of the states in the circuit by striking down South Carolina’s ban on same-sex marriages.\(^{36}\) The judge rejected procedural arguments made by the state and found the Fourth Circuit’s opinion in *Bostic* to be controlling.

Judge Gergel was appointed to the federal bench by President Obama in 2010. Prior to serving on the judiciary, he was a plaintiffs’ lawyer who handled personal injury and employment discrimination cases.

Six days after Judge Gergel’s ruling, on November 18, 2014, District Judge J. Michelle Childs also struck down South Carolina’s marriage ban.\(^{37}\) Judge Childs was appointed to the federal bench in 2010 by President Obama. She had previously worked as a state judge and in South Carolina’s Department of Labor.

### Where Same-Sex Marriage Stands in the Circuit

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<th>State</th>
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**FIFTH CIRCUIT**  
Louisiana, Mississippi, Texas

### Louisiana

On September 3, 2014, Eastern District of Louisiana Judge Martin L.C. Feldman upheld Louisiana’s ban on same-sex marriage.\(^{38}\) Judge Feldman ruled that Louisiana “‘was acting squarely within the scope of its traditional authority’ in defining marriage.”\(^{39}\) He applied the deferential “rational basis” standard in deciding whether the law violated the Equal Protection Clause of the Fourteenth Amendment, and found that Louisiana’s law passed that test.\(^{40}\) The law was not motivated by animus toward same-sex couples, Judge Feldman reasoned, but by “achieving marriage’s historically preeminent purpose of linking children to their biological parents.”\(^{41}\) Judge Feldman similarly dispatched the plaintiffs’ due process claim, finding that “No authority dictates . . . that same-sex marriage is anchored to history or tradition.”\(^{42}\)

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39 *Robicheaux*, 2 F. Supp. 3d at 917.
40 Id.
41 Id. at 920.
42 Id. at 922.
Judge Feldman was particularly concerned about the parade of horribles that could occur if he found in favor of marriage equality.

[M]ust the states permit or recognize a marriage between an aunt and niece? Aunt and nephew? Brother/brother? Father and child? May minors marry? Must marriage be limited to only two people? What about a transgender spouse? Is such a union same-gender or male-female?  

The case is still pending on appeal in the Fifth Circuit. The court will likely overturn Judge Feldman’s ruling, given the Supreme Court’s decision in Obergefell.

Judge Feldman was appointed to the federal bench by President Reagan on September 9, 1983. In 2010, Chief Justice John Roberts appointed Judge Feldman to serve on the United States Foreign Intelligence Surveillance Court. Prior to this case, his most notable decision was in 2010 when he struck down President Obama’s moratorium on deep-water drilling following the BP oil spill. Before joining the bench, Judge Feldman worked in private practice.

Texas

On February 26, 2014, Western District of Texas Judge Orlando L. Garcia struck down the Texas constitution’s prohibition on same-sex marriage, which was enacted in 2005. In De Leon v. Perry, Judge Garcia found that the ban violated the Equal Protection Clause of the Fourteenth Amendment. Judge Garcia cited Windsor and applied the Supreme Court’s reasoning to “decide whether a state can do what the federal government cannot—discriminate against same-sex couples.” In his analysis, Judge Garcia noted that, because there was no rational basis for denying same-sex couples the right of marriage, the Texas law at issue could not survive even the lowest level of scrutiny. Texas has appealed the decision to the Fifth Circuit, which will likely affirm it.

Judge Garcia was appointed by President Clinton and has been on the federal bench since 1994. Prior to serving on the federal bench, Judge Garcia was a Democratic Texas state representative from 1983 to 1991 and later a judge on the Texas Court of Appeals.

Mississippi

Mississippi joined Texas on November 25, 2014, when Judge Carlton W. Reeves of the Southern District of Mississippi struck down the state’s marriage ban. Judge Reeves found Mississippi’s constitutional amendment prohibiting same-sex marriage likely violates the Due Process and Equal Protection clauses of the Fourteenth Amendment. The decision was initially stayed for only 14 days, but the Fifth Circuit extended the stay until it issues a ruling in the case—which will likely be to affirm it.

Judge Reeves was appointed to the federal bench by President Obama in 2010. He had previously worked in private practice and as an assistant United States attorney.

43 Id. at 926.
47 Id. at 652.
Where Same-Sex Marriage Stands in the Circuit

**Louisiana:** Will soon be legal. Ban upheld by federal district court, but likely to be overturned.

**Texas:** Will soon be legal. Ban struck down by federal district court on February 26, 2014.

**Mississippi:** Will soon be legal. Ban struck down by federal district court on November 25, 2014.

**SIXTH CIRCUIT**

**Kentucky, Michigan, Ohio, Tennessee**

**Kentucky**

On February 12, 2014, Western District of Kentucky Judge John Heyburn II held that Kentucky’s state constitutional restriction on recognizing valid out-of-state same-sex marriages violated the Equal Protection Clause of the Fourteenth Amendment. Judge Heyburn found that Kentucky law purposefully imposed inequality on gay couples and that the state lacked a reasonable justification for doing so. In his opinion, Judge Heyburn noted that his decision would be unwelcome by many in Kentucky, but responded by stating, “[the Government] cannot impose a traditional or faith-based limitation upon a public right without a sufficient justification for it. Assigning a religious or traditional rationale for a law, does not make it constitutional when that law discriminates against a class of people without other reasons.” Judge Heyburn stayed his decision pending an appeal to the Sixth Circuit. Kentucky Attorney General Jack Conway announced on March 4 that he would no longer defend the ban and would not appeal the case. The same day, Kentucky Governor Steve Beshear announced he would hire outside counsel to appeal and defend the ban.

After he ruled on the issue of out-of-state recognition, Judge Heyburn granted a motion to intervene and bifurcated and restyled the case as *Love v. Beshear*, allowing additional plaintiffs to argue to overturn the state’s ban on same-sex marriages performed in Kentucky. On July 1, 2014, Judge Heyburn ruled that Kentucky’s ban on same-sex marriages was also an unconstitutional violation of the Equal Protection Clause. Governor Beshear appealed that decision as well.

Judge Heyburn was appointed to the federal bench by President George H.W. Bush in 1992. He has longstanding ties to the Republican Party, including having served as a Special Counsel for Senate Minority Leader Mitch McConnell during McConnell’s time as county executive in Jefferson County.

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49 Ky. Const. § 233A.


51 *Id.*

52 *Id.* at 554.


54 *Id.*


**Ohio**

On December 23, 2013, Judge Timothy Black of the Southern District of Ohio ruled in *Obergefell v. Wymyslo* that Ohio must list a surviving spouse’s same-sex partner on a death certificate if the two were legally married in another state.\(^{57}\) In the narrow ruling, Judge Black held that Ohio’s ban on recognizing out-of-state same-sex marriages violates the Equal Protection and Due Process clauses. He cited *Windsor* and specifically noted Justice Scalia’s dissent, in which the justice predicted that the majority’s opinion “spelled defeat for any state’s refusal to recognize same-sex marriages authorized by a co-equal state.”\(^{58}\) Ohio appealed the decision to the Sixth Circuit.

In a separate case, *Henry v. Himes*, decided on April 14, 2014, Judge Black ruled more broadly that Ohio must fully recognize all same-sex marriages performed in other states. He held that the ban was “facially” unconstitutional “under any circumstances.”\(^{59}\) Judge Black found that *Windsor* could be read to require a “heightened” level of scrutiny for laws that discriminate based on sexual orientation.\(^{60}\) Regardless of the level of scrutiny applied, however, Judge Black found that Ohio’s marriage recognition laws did not “pass constitutional muster” because they did not provide a legitimate state interest.\(^{61}\) Judge Black stayed his ruling in *Henry* while both cases were appealed to the Sixth Circuit.

Judge Black was appointed to the federal bench by President Obama in 2010. Prior to his appointment he had served as a municipal court judge in Hamilton County and as a United States magistrate judge for the Southern District of Ohio.

**Tennessee**

On March 14, 2014, District Judge Aleta Trauger of the Middle District of Tennessee issued a preliminary injunction ordering the state of Tennessee to recognize the out-of-state marriages of three same-sex couples, countermanding Tennessee’s anti-recognition laws.\(^{62}\) Because the plaintiffs did not seek class relief, the order was strictly limited to the three couples in the case of *Tanco v. Haslam*, and aside from those individuals Tennessee’s anti-recognition laws, as well as the ban on gay marriages performed within Tennessee, are still valid.\(^{63}\) The state appealed Judge Trauger’s order granting the preliminary injunction to the Sixth Circuit.

Judge Trauger was appointed to the federal bench by President Clinton in October 1998. Prior to her appointment she had served as a bankruptcy judge and an assistant United States attorney.

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\(^{58}\) Id. at 973 n.1.


\(^{60}\) Id. at *14.

\(^{61}\) Id. at *15.


\(^{63}\) Id.
Michigan

On March 21, 2014, District Judge Bernard Friedman of the Eastern District of Michigan struck down the Michigan state constitution’s ban on gay marriage, which had been passed by the voters of Michigan in 2004. The provision effectively prohibited gay couples from jointly adopting children since adoption was restricted to either single persons or married couples. In DeBoer v. Snyder, Judge Friedman found that the amendment and its implementing statutes violated the Equal Protection Clause of the Fourteenth Amendment. In his opinion, Judge Friedman stated that none of the state’s purported rationales (an optimal environment for raising children, preserving the traditional understanding of marriage, upholding morality) justified a ban on same-sex marriage. Judge Friedman referenced Windsor and Loving v. Virginia, noting that those decisions stood for the proposition that “without some overriding legitimate interest, the state cannot use its domestic relations authority to legislate families out of existence.” He concluded that the decision “affirms the enduring principle that regardless of whoever finds favor in the eyes of the most recent majority, the guarantee of equal protection must prevail.” Because he found that the ban violated the Equal Protection Clause, Judge Friedman did not decide whether the ban also violated the Due Process Clause. The Sixth Circuit stayed Judge Friedman’s ruling pending appeal.

Judge Friedman was appointed to the federal bench by President Reagan in 1988 and took senior status in January 2009. Prior to his appointment, Judge Friedman worked in the Wayne County Prosecutor’s Office and then served as a Michigan state judge. Eastern District of Michigan Judge Judith Levy, who is openly gay, is a former law clerk to Judge Friedman. Levy was confirmed on March 12, 2014, and was the eighth openly gay Obama appointee to the federal bench.

Prior to this ruling, Judge Friedman was best known for his opinion in Grutter v. Bollinger, where he struck down the University of Michigan’s affirmative action policy as unconstitutional. That decision was overturned on appeal by the Sixth Circuit. The case later reached the Supreme Court, which affirmed the Sixth Circuit’s reversal of Judge Friedman’s decision.

Sixth Circuit Ruling

On November 6, 2014, a three-judge panel of the Sixth Circuit Court of Appeals reversed six lower court decisions and upheld bans on same-sex marriage in Kentucky, Michigan, Ohio, and Tennessee. The 2-1 decision was written by Judge Jeffrey Sutton (appointed by President George W. Bush in 2003) and joined by Judge Deborah Cook (President George W. Bush in 2003). Senior Judge Martha Daughtrey (President Bill

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66. Id. at 768.
67. Id. at 774.
68. Id. at 775.
69. Id. at 768.
Clinton in 1993) dissented. Judge Sutton opened his opinion by saying “the question is not whether American law will allow gay couples to marry; it is when and how that will happen.” The “how” was not going to be through a Sixth Circuit opinion. Judge Sutton’s extensive opinion went through a variety of legal rationales. He held that Baker v. Nelson, a 1972 Supreme Court case, was still binding on the court, that the original meaning of the Constitution did not include same-sex marriage, and that regulating sex through marriage was a legitimate state interest.

Judge Sutton is a former law clerk for Supreme Court Justices Antonin Scalia and Lewis Powell whose nomination to the Sixth Circuit was opposed by a large number of progressive groups based on his conservative views, particularly regarding congressional authority and federalism.

Judge Daughtrey wrote a scathing dissent which began: “The author of the majority opinion has drafted what would make an engrossing TED Talk or, possibly, an introductory lecture in Political Philosophy. But as an appellate court decision, it wholly fails to grapple with the relevant constitutional question in this appeal.” She cited the other circuit court rulings on marriage equality extensively, and argued that courts need to be at the forefront of protecting individual rights.

The case was appealed to the U.S. Supreme Court, which sided with the plaintiffs in a groundbreaking ruling issued on June 26, 2015.

**Where Same-Sex Marriage Stands in the Circuit**

**Kentucky:** Legalized by the U.S. Supreme Court on June 26, 2015.  
**Ohio:** Legalized by the U.S. Supreme Court on June 26, 2015.  
**Tennessee:** Legalized by the U.S. Supreme Court on June 26, 2015.  
**Michigan:** Legalized by the U.S. Supreme Court on June 26, 2015.

**SEVENTH CIRCUIT**  
Illinois, Indiana, Wisconsin

**Illinois**

The Illinois legislature passed Senate Bill 10 on November 5, 2013, allowing same-sex marriage in the state. The bill was not to go into effect, however, until June 1 of the following year. Four same-sex couples brought suit to have their relationships recognized immediately. On February 21, 2014, Judge Sharon Johnson Coleman struck down the state’s marriage prohibition law. “This Court has no trepidation that marriage is a fundamental right to be equally enjoyed by all individuals of consenting age regardless of their race, religion, or sexual orientation,” she wrote. “To paraphrase Dr. Martin Luther King, Jr.: the time is always ripe to do right.” The defendants did not appeal the ruling.

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75 Id. at *14.
77 DeBoer, 2014 U.S. App. LEXIS 21191 at *84 (Daughtrey, J. dissenting).
78 Id.
80 Id.at *4.
Judge Coleman was appointed to the federal bench by President Obama in 2010. Prior to serving, she was a state trial court and appellate judge, and had previously been the chief of the Cook County State’s Attorney’s Public Interest Bureau.

**Wisconsin**

On June 6, 2014, Judge Barbara Crabb of the Western District of Wisconsin ruled that Wisconsin’s same-sex marriage ban violated the Due Process and Equal Protection clauses. She referenced Justice Scalia’s *Windsor* dissent, agreeing that, with regard to state same-sex marriage bans, “it is difficult to cabin the Court’s reasoning to DOMA only.”\(^{82}\) In her ruling, Judge Crabb held that classifications based on sexual orientation demanded “heightened” scrutiny, and that Wisconsin’s laws would not meet that standard. Judge Crabb reasoned that, contrary to the state’s argument, denying same-sex marriage has a detrimental impact on children. She wrote, “[t]he most immediate effect that the same-sex marriage ban has on children is to foster less than optimal results for children of same-sex parents by stigmatizing them and depriving them of the benefits that marriage could provide.”\(^{83}\) Since the government did not have a legitimate state interest in banning same-sex marriage, she ruled that the ban was unconstitutional. Judge Crabb stayed her decision pending an appeal to the Seventh Circuit.

Judge Crabb was appointed to the federal bench by President Carter in 1979. She took senior status in March 2010. Judge Crabb is perhaps best known for an opinion wherein she ruled that the National Day of Prayer was an unconstitutional violation of the Establishment Clause.\(^{84}\) That decision was overturned on appeal by the Seventh Circuit.

**Indiana**

On June 25, 2014, Southern District of Indiana Chief Judge Richard L. Young ruled that Indiana’s statutory ban on same-sex marriage is “facially unconstitutional” because it violates the Due Process and Equal Protection clauses of the Fourteenth Amendment.\(^{85}\) In an opinion covering three consolidated cases (*Baskin v. Bogan, Fuji v. Pence, and Lee v. Pence*), Judge Young held that Indiana’s ban was subject to “strict scrutiny” on the due process claim because it interferes with a “fundamental right.”\(^{86}\) Alternatively, Judge Young held that the ban was subject to “rational basis” scrutiny on the equal protection claim.\(^{87}\) The Indiana law did not satisfy either standard. Judge Young stated: “The purpose of marriage—to keep the couple together for the sake of their children—is served by marriage regardless of the sexes of the spouses.”\(^{88}\) Therefore, there was no rational basis for excluding same-sex couples from marriage. The Seventh Circuit stayed Judge Young’s ruling pending an expedited appeal consolidated with Wisconsin’s appeal.

On August 19, 2014, Judge Young again struck down the state’s marriage ban.\(^{89}\) In the first case, Judge Young had dismissed claims against Indiana Governor Michael Pence. Governor Pence had claimed he

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81 *Id.*
83 *Id.* at 1023.
84 Freedom from Religion Foundation, Inc. v. Obama, 705 F. Supp. 2d 1039 (W.D. Wis. 2010).
86 *Id.* at *9.
87 *Id.* at *11.
88 *Id.* at *13.
had no part in enforcing the state’s marriage ban. However, after the decision was released, Governor Pence began issuing memos to executive branch agencies regarding same-sex marriages. Judge Young called the Governor’s earlier representations “at a minimum, troubling,” and enjoined him from enforcing the anti-marriage law.90

Judge Young was appointed to the federal bench by President Clinton in 1998. He has served as chief judge since 2009. Prior to his appointment he served as corporation counsel to the City of Evansville, a public defender in the Vanderburgh Circuit Court, and later a judge in the same court. He was a member of the Judicial Conference of the United States from 2009 through 2012.

Seventh Circuit Ruling

The Seventh Circuit consolidated Wisconsin’s appeal with Indiana’s appeal and heard oral arguments on August 26, 2014 in both cases. Only nine days later, a unanimous three-judge panel affirmed both lower court decisions. The panel included Judges Richard Posner (appointed by President Reagan in 1981), Ann Claire Williams (President Clinton in 1999), and David Hamilton (President Obama in 2009). Judge Posner, writing for the panel, held that Wisconsin’s failure to recognize same-sex marriages violated the Equal Protection Clause of the Fourteenth Amendment.91 Though Judge Posner applied a “heightened scrutiny” standard, he noted that the law would fail even the undemanding “rational basis” test.92

Judge Posner harshly criticized the two states’ arguments throughout his opinion. He called Indiana’s argument that infertile first cousins should be allowed to marry because, unlike homosexual couples, they provide a proper model of family life “impossible to take seriously.”93

[Ｍ]ore than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children or any other valid and important interest of a state is necessary to justify discrimination of the basis of sexual orientation. As we have been at pains to explain, the grounds advanced by Indiana and Wisconsin for the discriminatory policies are not only conjectural; they are totally implausible.94

On September 9, 2014, Wisconsin Governor Scott Walker and several Indiana county and state officials filed petitions for writs of certiorari. The panel stayed its ruling on September 15, 2014, pending the petitions.95 On October 6, 2014, the Supreme Court denied certiorari and the stays were lifted.

Where Same-Sex Marriage Stands in the Circuit

**Illinois**: Legalized by the state legislature on November 20, 2013.

**Wisconsin**: Legalized by Seventh Circuit on August 26, 2014. *Certiorari* denied by U.S. Supreme Court.

**Indiana**: Legalized by the Seventh Circuit on August 26, 2014. *Certiorari* denied by U.S. Supreme Court.

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90 Id. at *11.
91 Baskin v. Bogan, 766 F.3d 648, at 664 (7th Cir. 2014).
92 Id. at 656.
93 Id. at 662.
94 Id. at 671.
### EIGHTH CIRCUIT
Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota

#### Missouri
![Judge Smith](image1.png)

On November 7, 2014, Western District of Missouri Judge Ortrie D. Smith struck down Missouri’s ban on same-sex marriage as a violation of the Due Process Clause and gender-based discrimination in violation of the Equal Protection Clause. The judgment did not include any legal analysis. The case was appealed to the Eight Circuit, which will likely affirm the ruling.

Judge Smith was appointed to the federal bench by President Clinton in 1995. Prior to serving, he worked in private practice.

#### Arkansas
![Judge Baker](image2.png)

Eastern District of Arkansas Judge Kristine G. Baker followed Judge Smith’s lead on November 25, 2014, when she struck down the state’s marriage ban. State officials had made a number of procedural arguments for Judge Baker to dismiss the case, all of which she rejected. Judge Baker went on to strike down the marriage prohibition as a violation of the Due Process and Equal Protection clauses. The case is on appeal to the Eighth Circuit, which will likely affirm it.

Judge Baker had worked in private practice before being nominated to the bench by President Obama in 2011.

#### South Dakota
![Judge Schreier](image3.png)

On January 12, 2015, District of South Dakota Judge Karen E. Schreier struck down a South Dakota constitutional amendment which prohibited marriage between same-sex couples, finding that it violated the Due Process and Equal Protection clauses. Judge Schreier stayed the ruling, which is likely to be affirmed by the Eighth Circuit.

President Clinton appointed Judge Schreier to the federal bench in 1999. Prior to serving, she had worked in private practice.

#### Nebraska
![Judge Bataillon](image4.png)

District of Nebraska Judge Joseph F. Bataillon became the latest federal judge to strike down a marriage ban in the Eighth Circuit on March 2, 2015 in *Waters v. Ricketts*. Judge Bataillon issued a preliminary injunction, finding that Nebraska’s anti-marriage constitutional amendment was an “unabashedly gender-specific infringement of the equal rights of [Nebraska’s] citizens.” The Eighth Circuit stayed the ruling, by will likely lift it when it affirms Judge Bataillon’s ruling based on *Obergefell*.

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In 2005, Judge Bataillon struck down Nebraska’s marriage ban for the first time, but he was overturned on appeal by the Eighth Circuit. Judge Bataillon spent his early career as a deputy public defender in Douglas County, Nebraska, before going into private practice. He was appointed to the federal bench by President Clinton in 1997.

**Where Same-Sex Marriage Stands in the Circuit**

- **Iowa**: Legalized by the state supreme court on April 3, 2009.
- **Minnesota**: Legalized by the state legislature on May 14, 2013.
- **Missouri**: Will soon be legal. Ban struck down by federal district court on November 7, 2014.
- **Arkansas**: Will soon be legal. Ban struck down by federal district court on November 25, 2014.
- **South Dakota**: Will soon be legal. Ban struck down by federal district court on January 12, 2015.
- **Nebraska**: Will soon be legal. Ban struck down by federal district court on March 2, 2015.
- **North Dakota**: Will soon be legal. Federal cases are pending in district court.

**NINTH CIRCUIT**

Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington

**California**

In August 2010, Northern District of California Chief Judge Vaughn Walker ruled that California’s Proposition 8 ban on same-sex marriage violated the Equal Protection and Due Process clauses of the Fourteenth Amendment. Judge Walker ruled that Proposition 8 violated the Equal Protection Clause under any standard of review, including the most lenient. In addition, Judge Walker held that the freedom to marry was a fundamental right protected by the Due Process Clause, and therefore any violation was subject to “strict scrutiny,” the most exacting standard of review in the Supreme Court’s constitutional jurisprudence. His decision was appealed to the Ninth Circuit and later to the Supreme Court (renamed *Hollingsworth v. Perry*). The Supreme Court found that the party defending Proposition 8—the proponents of the marriage ban when it was proposed and adopted in 2008—lacked the constitutionally required standing to appeal Judge Walker’s ruling. As a result of the Supreme Court’s decision, Judge Walker’s ruling became final and California began issuing same-sex marriage licenses.

Judge Walker was appointed to the federal bench by President George H.W. Bush in 1989. He had originally been nominated by President Reagan in 1987, but was opposed by Democrats—including two dozen House members—who perceived him to be insensitive to gay issues. Judge Walker retired from the bench in February 2011. Following his retirement, Judge Walker announced that he is gay.

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101 Id. at 991.
In April 2012, eight gay couples who had been denied marriage licenses filed a lawsuit, *Sevcik v. Sandoval*,104 challenging Nevada’s state constitutional prohibition against same-sex marriage. In November of that same year (before the Supreme Court decided either *Perry* or *Windsor*), Judge Robert C. Jones of the District of Nevada ruled that classes defined by sexual orientation, as opposed to race or national origin, are not inherently “suspect,” and therefore are not subject to “strict scrutiny” under an equal protection analysis. He further found that Nevada had a legitimate state interest in the “protection of the traditional institution of marriage,” and that Nevada’s prohibition of same-sex marriage was rationally related to that interest.105 Judge Jones found that since there had never been legal same-sex marriages in Nevada, the state was not removing any existing rights by outlawing them. He ultimately concluded, therefore, that the state had not violated the Fourteenth Amendment’s Equal Protection Clause.106

Judge Jones was appointed to the federal bench by President George W. Bush in 2003. Prior to his ruling in *Sandoval*, Judge Jones was known for declaring the “none of the above” option on Nevada election ballots unconstitutional. That ruling was overturned by the Ninth Circuit107 and Judge Jones was criticized by Circuit Judge Stephen Reinhardt for “dilatory tactics” in refusing to issue a written order until after the print deadline for ballots.108 Judge Reinhardt concluded that “[s]uch arrogance and assumption of power by one individual is not acceptable in our judicial system.”109

Following the decision upholding the same-sex ban, plaintiffs appealed to the Ninth Circuit Court of Appeals in December 2012. The Ninth Circuit placed the appeal on hold until the Supreme Court had a chance to rule in *Windsor*.

On February 10, 2014, Nevada Governor Brian Sandoval and Attorney General Catherine Cortes Masto withdrew their briefs in support of the ban, citing the Ninth Circuit’s decision in *SmithKline Beecham Corp. v. Abbott Laboratories*.110 In *Abbott*, the Ninth Circuit considered classifications based on sexual orientation in light of *Windsor* and found that “we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection.”111 In explaining their decision to stop defending the ban, the Nevada officials acknowledged that *Abbott* overruled Judge Jones’s holding in *Sandoval*, and that their defenses were “no longer tenable.”112

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105 *Id.* at 1014.
106 *Id.* at 1019-20.
107 *Townley v. Miller*, 722 F.3d 1128 (9th Cir. 2013).
109 *Id.*
110 *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014).
111 *Id.* at 484.
Idaho

On May 13, 2014, Magistrate Judge Candy Dale struck down Idaho’s ban on same-sex marriage, which had been enacted in 2006. Two gay couples brought the case: one seeking the right to marry within Idaho, and the other seeking recognition of an out-of-state marriage. In her decision, Judge Dale cited Justice Antonin Scalia’s dissent in *Lawrence v. Texas*, where he said, “preserving the traditional institution of marriage’ is just a kinder way of describing the State’s moral disapproval of same-sex couples.”

Following Justice Scalia’s reasoning, Judge Dale held that Idaho could not ban same-sex marriage based solely on moral disapproval. She held that the due process claims would be held to the highest “strict scrutiny” standard because the laws “infringe upon Plaintiffs’ fundamental right to marry.” Additionally, she reasoned that the equal protection claims would be held to the “heightened” standard of scrutiny because the laws “intentionally discriminate on the basis of sexual orientation.” Judge Dale concluded that the state’s “justifications echo the unsubstantiated fears that could not prop up the antimiscegenation laws and rigid gender roles of days long past. . . . Here, the facts are clear and the law teaches that marriage is a fundamental right of all citizens, which neither tradition nor the majority can deny.”

Idaho Governor Butch Otter appealed the decision to the Ninth Circuit.

Judge Dale was appointed to her position by Chief District Judge B. Lynn Winmill, and took her seat on March 30, 2008. Prior to her appointment, Judge Dale practiced commercial and business law at a firm in Idaho.

Oregon

On May 19, 2014, District of Oregon Judge Michael McShane ruled that Oregon’s constitutional amendment banning gay marriage violated the Equal Protection Clause of the Fourteenth Amendment. He cited the Supreme Court’s decision in *Windsor*, finding that the principles outlined therein—that laws must “not ‘degrade or demean’ the plaintiffs in violation of their rights to equal protection”—also apply to the states. Addressing the state’s argument that a same-sex marriage ban encourages responsible procreation, Judge McShane wrote, “any governmental interest in responsible procreation is not advanced by denying marriage to gay and lesbian couples. There is no logical nexus between the interest and the exclusion.”

Oregon Attorney General Ellen Rosenblum, supported by Democratic Governor John Kitzhaber, had refused to defend the ban in court, though he had still enforced the law. Attorney General Rosenblum did not appeal the decision, and same-sex marriage became legal in Oregon.

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115 Id. at *21 (citing *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting)).
116 Id. at *7.
117 Id.
118 Id. at *28.
120 Id. at 1145.
121 Jeff Mapes, Gay marriage advocates have big day as Oregon AG Ellen Rosenblum says ‘no rational basis’ for ban, *The Oregonian* (Feb. 20, 2014, 5:23 PM), http://www.oregonlive.com/mapes/index.ssf/2014/02/gay_marriage_advocates_have_bi.html.
Judge McShane was appointed by President Obama in 2013 and is one of only 10 openly gay active federal judges. Prior to his appointment, Judge McShane worked as a state public defender and later a Multnomah County Circuit Judge.

Ninth Circuit Ruling

On October 7, 2014, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit struck down the bans on same-sex marriage in Nevada and Idaho. As expected, the court applied a heightened scrutiny standard to discrimination based on sexual orientation, following its decision in *SmithKline* discussed earlier. The unanimous opinion, written by Judge Stephen Reinhardt (appointed by President Carter in 1980) and joined by Marsha S. Berzon (President Clinton in 2000) and Ronald M. Gould (President Clinton in 1999), quickly dispatched the defendants’ arguments. Judge Reinhardt wrote that Idaho’s argument that children need opposite-sex parents to raise them “reflects a crass and callous view of parental love and the parental bond that is not worthy of response. We reject it out of hand.”

He concluded:

> The lessons of our constitutional history are clear: inclusion strengthens, rather than weakens, our most important institutions. When we integrated our schools, education improved. When we opened our juries to women, our democracy became more vital. When we allowed lesbian and gay soldiers to serve openly in uniform, it enhanced unit cohesion. When same-sex couples are married, just as when opposite-sex couples are married, they serve as models of loving commitment to all.

Judge Reinhardt, concurring with his own opinion, invoked *Loving v. Virginia* to argue that the Due Process Clause of the United States Constitution provided a fundamental right to marry to all same-sex couples. Judge Berzon also concurred to argue the bans discriminated on the basis of gender, and thus were unconstitutional under the Equal Protection Clause. A man is free to marry a woman, but not a man; a woman is free to marry a man, but not a woman. Such classifications, she argued, are gender-based and thus subject to intermediate scrutiny.

The Ninth Circuit remanded the Nevada case to Judge Jones to issue an injunction against the marriage ban. In an unexpected decision, the judge recused himself from the case after receiving the order, leading some to speculate he had strong, personal views against same-sex marriages. The case was reassigned to Judge James C. Mahan, who promptly issued the injunction.

Alaska

On October 12, 2014, District of Alaska Judge Timothy M. Burgess struck down Alaska’s ban on marriage equality. Citing the Ninth Circuit decision in *Latta*, he held that Alaska’s constitutional amendment prohibiting same-sex marriages violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Judge Burgess also responded to the state’s argument that voters should be left to decide

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123 Id. at *51-52 (citations omitted).
124 Id. at *60-61 (Berzon, J., concurring).
the merits of same-sex marriage:

Even if a majority of citizens disapprove of homosexuality, an infringement on same-sex couples’ constitutional rights must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. The basic principle is that fundamental rights may not be submitted to vote; they depend on the outcome of no elections.\textsuperscript{126}

Judge Burgess was appointed to the federal bench by George W. Bush in 2006. Prior to serving, he was the U.S. Attorney for the District of Alaska.

\textbf{Arizona}

On October 17, 2014, District of Alaska Judge John W. Sedwick (temporarily sitting for the District of Arizona) issued a short ruling striking down Arizona’s same-sex marriage ban, in light of the Ninth Circuit’s recent ruling.\textsuperscript{127}

Judge Sedwick was appointed to the federal bench by President George H.W. Bush in 1992. Prior to joining the federal bench, he had worked in private practice in Alaska and was a sergeant with the United States Air Force.

\textbf{Montana}

On November 19, 2014, Montana became the final state in the Ninth Circuit to legalize marriage equality when District of Montana Judge Brian Morris struck down the state’s prohibition.\textsuperscript{128} Judge Morris recognized that “not everyone will celebrate this outcome,” but that “[t]he time has come for Montana to follow all the other states within the Ninth Circuit and recognize that laws that ban same-sex marriage violate the constitutional right of same-sex couples to equal protection of the laws. Today Montana becomes the thirty-fourth state to permit same-sex marriage.”

Judge Morris was an associate justice with the Montana Supreme Court before being appointed to the federal bench by President Obama in 2013.

\textbf{Guam}

On June 8, 2015, a District of Guam Judge Frances Tydingco-Gatewood issued a permanent injunction prohibiting enforcement of Guam’s same-sex marriage ban. The Ninth Circuit Court of Appeals had already ruled in favor of marriage equality, and “once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it.”\textsuperscript{129}

Judge Tydingco-Gatewood was an associate justice with the Supreme Court of Guam before being appointed to her current position by President George W. Bush in 2006.

\textbf{Where Same-Sex Marriage Stands in the Circuit}

\textbf{Washington:} Legalized by the state legislature. Upheld by voter referendum on November 6, 2012.


\textsuperscript{128} Rolando v. Fox, 23 F. Supp. 3d 1227 (D. Mont. 2014).
\textsuperscript{129} Aguero v. Baza Calvo, No. 1:15-cv-00009, slip op. at 4 (D. Guam June 8, 2015).
Hawaii: Legalized by the state legislature on November 13, 2013.
Oregon: Legalized by a federal district court on May 19, 2014.
Nevada: Legalized by the Ninth Circuit on October 7, 2014.
Idaho: Legalized by the Ninth Circuit on October 7, 2014.
Alaska: Legalized by a federal district court on October 12, 2014.
Arizona: Legalized by a federal district court on October 17, 2014.
Montana: Legalized by a federal district court on November 19, 2014.
Guam: Legalized by a federal district court on June 8, 2015.

**TENTH CIRCUIT**
**Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming**

**Utah**

On December 20, 2013, Judge Robert J. Shelby of the District of Utah struck down Utah’s state constitutional ban on same-sex marriage, which had been passed by voters in 2004. In his decision in *Kitchen v. Herbert*, Judge Shelby cited the Supreme Court’s decision in *Windsor* as the basis for invalidating Utah’s ban, and finding that the deprivation of marriage rights for gay couples amounted to a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. He also quoted Justice Scalia’s dissent in *Windsor*, discussing the ramifications of that ruling: “As I have said, the real rationale of today’s opinion . . . is that DOMA is motivated by ‘bare . . . desire to harm’ couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.” Judge Shelby refused to stay his ruling pending an appeal to the Tenth Circuit; however, the Supreme Court intervened and issued a stay on January 6, 2014.

Judge Shelby was appointed to the federal bench by President Obama in September 2012 after he was recommended by Senator Orin Hatch (R-UT) and supported by Senator Mike Lee (R-UT). Prior to his appointment, Judge Shelby had been in private practice in Utah.

**Oklahoma**

On January 14, 2014, Northern District of Oklahoma Judge Terence Kern struck down an Oklahoma constitutional amendment banning same-sex marriage, which voters approved in 2004. Judge Kern held that the amendment’s ban on same-sex marriages within Oklahoma “intentionally discriminates against same-sex couples” with no legally sufficient justification, thus violating the Equal Protection Clause.

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132 *Id.* at 1216.
133 *Id.* at 1194 (citing *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting)).
137 *Id.* at 1274.
not hold the ban to any form of heightened scrutiny,\textsuperscript{138} but found that it could not survive even a rational basis test (the most lenient form of review) for constitutionality.\textsuperscript{139} Neither the state’s moral disapproval of homosexuality nor its attempt to promote the optimal child-rearing environment was seen as sufficient justification for the ban.\textsuperscript{140}

Judge Kern was appointed to the federal bench by President Clinton in June 1994 after he was recommended by former Senators Don Nickles (R-OK) and David Boren (D-OK).\textsuperscript{141} Prior to his appointment, Judge Kern worked as a general attorney at the Federal Trade Commission and in private practice in Oklahoma. Judge Kern took senior status in January 2014.

**Tenth Circuit Ruling**

A three-judge panel of the Tenth Circuit heard oral arguments in the Utah case on April 10, 2014, and in the Oklahoma case on April 17, 2014. The panel consisted of Judge Paul J. Kelly (appointed by President George H.W. Bush in 1992), Judge Carlos F. Lucero (President Clinton in 1995), and Judge Jerome A. Holmes (President George W. Bush in 2006). Judge Kelly is a former state legislator who has previously said that his legislative experience made him “cautious about superimposing the court’s will for that of the people expressed through their duly elected representatives and executive.”\textsuperscript{142} Judge Lucero, the only member of the panel appointed by a Democratic president, has stated: “The law does not allow the type of discriminatory behavior that is at issue in these type of cases.”\textsuperscript{143} Judge Holmes has been described as “extremely conservative” and “the next Clarence Thomas,”\textsuperscript{144} but he was also one of the two judges who refused to grant a stay of Judge Shelby’s ruling in *Herbert* when the State of Utah requested one from the Tenth Circuit.\textsuperscript{145} In the order denying the stay, Judge Holmes, along with Judge Robert Bacharach, found that Utah had not demonstrated likelihood of success on appeal or the threat of irreparable harm.\textsuperscript{146}

On June 25, 2014, the Tenth Circuit affirmed Judge Shelby’s ruling striking down Utah’s ban on same-sex marriages. The decision was 2-1 with Judges Lucero and Holmes affirming that the ban violates the Fourteenth Amendment’s Due Process and Equal Protection clauses. Writing for the majority, Judge Lucero stated:

> We hold that the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state’s marital laws. A

\textsuperscript{138} Id. at 1286.

\textsuperscript{139} Id. at 1296.

\textsuperscript{140} Id. at 1288-94.


\textsuperscript{142} Howard J. Bashman, 20 Questions for Circuit Judge Paul J. Kelly, Jr. of the U.S. Court of Appeals for the Tenth Circuit, HOW APPEALING (July 6, 2004, 12:00 AM), http://howappealing.law.com/20q/2004_07_01_20q-appellateblog_archive.html.


state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union.\textsuperscript{147}

Because the majority found marriage to be a “fundamental liberty,” it analyzed Utah’s ban against a standard of “strict scrutiny.”\textsuperscript{148} Since the ban was not a “narrowly tailored” to serve the state’s interests, the ban did not pass constitutional muster.\textsuperscript{149} Judge Kelly voted to reverse Judge Shelby’s ruling and argued that, holding Utah’s ban to the rational basis level of scrutiny, there were important state interests in regulating marriage.

The same panel ruled again in a 2-1 decision on July 18, 2014, striking down Oklahoma’s same-sex marriage ban with a similar analysis.\textsuperscript{150} The court stayed its decisions pending a filed and accepted writ of \textit{certiorari} to the Supreme Court. On October 6, 2014, the Supreme Court denied \textit{certiorari} in both cases and the Tenth Circuit’s stay was lifted.

\textbf{Colorado}

On July 23, 2014, District of Colorado Judge Raymond P. Moore issued a preliminary injunction barring officials from enforcing Colorado’s constitutional amendment prohibiting same-sex marriage. The opinion was based on the Tenth Circuit’s ruling in the Utah case \textit{Kitchen v. Herbert}.\textsuperscript{151} Since Colorado is located within the Tenth Circuit’s jurisdiction, the \textit{Kitchen} ruling is binding on Colorado federal courts and Judge Moore did not present an expansive legal analysis of the same-sex marriage question. Judge Moore issued a temporary stay of his injunction until August 25, 2014, giving Colorado officials the option to appeal to the Tenth Circuit, which Attorney General John Suthers promptly did.

Judge Moore was appointed to the federal bench by President Obama in 2013. Prior to his appointment he had served as an assistant United States attorney, a partner at a Denver-based law firm, and the Federal Public Defender for Colorado and Wyoming.

On October 6, 2014, the Supreme Court denied \textit{certiorari} in \textit{Kitchen v. Herbert} and \textit{Bishop v. United States}. Because Tenth Circuit decisions are binding on Colorado, Attorney General Suthers announced that same-sex marriage will be legal in the state.\textsuperscript{152} On October 17, 2014, with the consent of both parties, Judge Moore replaced the preliminary injunction with a permanent one.\textsuperscript{153}

\textsuperscript{147} \textit{Kitchen v. Herbert}, 755 F.3d 1193, 1199 (10th Cir. 2014).
\textsuperscript{148} \textit{Id.} at *21.
\textsuperscript{149} \textit{Id.} at *22.
\textsuperscript{150} \textit{Bishop v. Smith}, 760 F.3d 1070 (10th Cir. 2014).
\textsuperscript{152} \textit{Colorado Attorney General Comments on U.S. Supreme Court Decision to Deny Ruling on Same-Sex Marriage Cases}, \textit{COLORADO STATE ATTORNEY GENERAL} (Oct. 6, 2014), http://www.coloradoattorneygeneral.gov/press/news/2014/10/06/colorado_attorney_general_comments_us_s_upreme_court_decisiondeny_ruling_same_.
**Wyoming**

On October 17, 2014, District of Wyoming Judge Scott Skavdahl issued a preliminary injunction against enforcement of Wyoming’s marriage equality prohibition. Judge Skavdahl wrote that he preferred to have marriage equality debated by the people and changed by the legislature, but recognized “that ship has sailed.” The Tenth Circuit’s decisions in *Herbert v. Kitchen* and *Smith v. Bishop* were binding on the judge, and thus, he ruled in favor of the plaintiffs. On October 21, 2014, Wyoming announced it would not appeal the decision, and, the next day, Judge Skavdahl issued a permanent injunction against enforcement of the state’s marriage ban.154

Judge Skavdahl was appointed to the federal bench by President Barack Obama in 2011. Prior to joining the federal bench, he had worked in private practice and as both a state and federal magistrate judge.

**Kansas**

On November 4, 2014, District of Kansas Judge Daniel Crabtree issued a preliminary injunction against enforcement of Kansas’s ban on same-sex marriage.155 The judge first dismissed several procedural arguments made by the state. Then, citing both previous Tenth Circuit rulings, Judge Crabtree found that Kansas’s law violates both the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

Judge Crabtree was appointed to the federal bench by President Obama in 2013. Prior to serving on the federal bench, he had worked in private practice and was General Counsel to the Kansas City Royals baseball team.

**Where Same-Sex Marriage Stands in the Circuit**

- **New Mexico**: Legalized by the state supreme court on December 19, 2013.
- **Utah**: Legalized by the Tenth Circuit on June 25, 2014. Certiorari denied by the U.S. Supreme Court.
- **Oklahoma**: Legalized by the Tenth Circuit on July 18, 2014. Certiorari denied by U.S. Supreme Court.
- **Colorado**: Legalized by a federal district court on October 17, 2014.
- **Wyoming**: Legalized by a federal district court on October 21, 2014.
- **Kansas**: Will soon be legal. Ban struck down by federal district court on November 4, 2014.

**Eleventh Circuit**

- Alabama, Florida, Georgia

**Florida**

On August 21, 2014, Northern District of Florida Judge Robert L. Hinkle issued a preliminary injunction barring Florida officials from enforcing the state’s ban on same-sex marriage. Judge Hinkle found a fundamental right to marry for same-sex couples in the Due Process Clause of the Fourteenth Amendment.156 He refused to distinguish between marriage and same-sex marriage, finding that the right to marry was broad and

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covered same-sex couples. The plaintiffs were unsuccessful, however, on their claim under the Equal Protection Clause of the Fourteenth Amendment. Judge Hinkle held that a 2004 Eleventh Circuit decision upholding a ban on adoption for same-sex couples required him to apply a deferential “rational basis” review to the marriage ban. Still, Judge Hinkle reasoned, the earlier decision said nothing about the fundamental right to marry. He then applied a “strict scrutiny” analysis for the due process claim, and, finding the law failed to meet the standard, issued the preliminary injunction.

The injunction was stayed pending appeal to the Eleventh Circuit Court of Appeals, which will likely affirm the decision and lift the stay soon.

Judge Hinkle was appointed to the federal bench by President Clinton in 1996. He has served as chief judge of the district since 2004. Prior to his appointment, he had worked in private practice at firms in Georgia and Florida.

### Alabama

On January 23, 2015, Southern District of Alabama Judge Callie V.S. Granade struck down that state’s constitutional amendment and statute prohibiting same-sex marriage. Her ruling included a short stay, but the Eleventh Circuit allowed it to expire.

As in Kansas, Judge Granade’s order was met with resistance from the state’s probate judges. On January 25, the Alabama Probate Judges Association issued a statement saying “this case only applies to the parties in the case and has no effect on anybody that is not a named party.” On January 27, Alabama Chief Justice Roy Moore—infamous for being removed from office, and subsequently reelected, and refusing to follow a federal court order to remove a Ten Commandments statue from the courthouse—wrote a letter to Alabama Governor Robert Bentley urging him to resist Judge Granade’s ruling. “Be advised that I stand with you to stop judicial tyranny and any unlawful opinions issued without constitutional authority,” the letter concludes.

On March 3, the Supreme Court of Alabama issued its own ruling, ordering the state’s probate judges to not issue marriage licenses to same-sex couples. Judge Granade reaffirmed the constitutional right of same-sex couples to marry in the state on May 21 in a class action against all of the state’s probate judges. However, she put her order on hold until the Supreme Court reached its decision in Obergefell v. Hodges. It will be lifted soon.

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157 Id. at 1288.
158 Id. at 1291.
159 Id.
160 Id. at 1292.
Judge Granade was appointed to the federal bench by President George W. Bush in 2002. Prior to serving, she was an assistant United States attorney.

Where Same-Sex Marriage Stands in the Circuit

**Florida**: Will soon be legal. Ban struck down by federal district court on August 21, 2014.


**Georgia**: Will soon be legal. A federal case is pending in district court.

**District of Columbia Circuit**
Washington, D.C.

Where Same-Sex Marriage Stands in the Circuit

**Washington, D.C.**: Legalized by the city council on December 18, 2009.

Conclusion

The speed with which marriage equality went from an unwinnable legal strategy to the law of the land is extraordinary. The Supreme Court opened a door with its rulings in Perry and Windsor, and nearly every subsequent federal challenge resulted in judges—both Democratic and Republican appointees—striking down state bans on same-sex marriage. Now the Supreme Court has expanded on that momentum and made marriage equality a reality nationwide. As AFJ celebrates this ruling, we are reminded once again of the centrality of the Supreme Court and all our federal courts in securing fundamental rights.